Filed 6/16/09 In re A.R. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.R., a Person Coming Under the Juvenile Court Law.	B212647 (Los Angeles County Super. Ct. No. CK 64930)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. A.B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Robert Stevenson, Referee. Affirmed.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Fred Klink, Deputy County Counsel, for Plaintiff and Respondent.

* * * * * *

Appellant appeals the juvenile court's order terminating parental rights and referring the minor for adoption under Welfare and Institutions Code section 366.26.[1] Appellant, a California prisoner, was incarcerated in an Oklahoma prison as part of the recently enacted California Out-of-State Correctional Facility (COCF) Program due to overcrowded California prisons. Appellant contends a deprivation of due process because he was not allowed to come to court to assert his position regarding the minor despite a request to be transported. He asserts that he was entitled to the same rights as a California inmate and as such had the right to be transported to court for the section 366.26 hearing. Appellant further argues respondent Los Angeles County Department of Children and Family Services (Department) was required to provide, and failed to provide, appellant with a mandatory statement regarding paternity form (JV-505) to clarify his paternity status.

The Department argues that appellant lacks standing to appeal because he was merely an alleged father, not a presumed father, and he did not take steps to change his status. The Department contends that, even were this court to reach the merits, the order should not be reversed because, even though the Department concedes it was error not to provide father with the statement regarding paternity form and to fail to bring him to court, there was no reasonable probability appellant would have qualified for presumed father status, and therefore the errors he complains of were harmless.

We agree with the Department, and therefore affirm.

FACTS AND PROCEDURAL HISTORY

The minor came under the jurisdiction of the juvenile court at age six in September 2006, when the mother, who is not a party to this appeal, gave birth to a child with symptoms of methamphetamine withdrawal.[2] The minor and his half-

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[1] All further statutory references are to the Welfare and Institutions Code unless indicated otherwise.

[2] The minor's infant brother allegedly has a different father.

sibling were ordered detained and placed with their maternal aunt, with whom the minor had resided since 2002.

Mother appeared in court at a pretrial resolution conference on October 16, 2006. She filled out a paternity declaration form stating the father's first name was "A----." She stated she did not know the father's last name or his whereabouts. Mother declared she was not married to the father, he had not signed papers establishing paternity at the hospital, she was not living with the father when the minor was conceived or born, and the father never received the minor in his home or held the minor out as his child. Mother declared no paternity test had been performed as to the minor. After her October 2006 court appearance, mother never appeared in court again.

During the hearing on October 16, 2006, the juvenile court orally referred to the minor's unknown father as the "alleged father," but the minute order entered by the clerk for the hearing erroneously recited that "[t]he court finds that A---- (last name unknown), is the *presumed* father of the minor . . . ." (Italics added.)

Three days after the hearing, a social worker interviewed mother. Mother admitted she was addicted to methamphetamine and stated she was dying of syphilis that had "gone to [her] brain." Mother also stated the minor's father was not named A----, and she did not know what his first name was. No father was named on the minor's birth certificate. Mother wanted the minor to be adopted by her sister, to whom he was already attached, and for his younger half-sibling also to be adopted by the sister.

The juvenile court held a jurisdictional hearing in December 2006. The court expressly found that the Department had exercised due diligence in attempting to locate the "I.D. unknown father" of the minor and declared the minor a dependent of the court.

Thereafter, in status review reports of May 2007 and December 2007, the Department called the court's attention to the error in the minute order that referred to the minor's unknown father as a "presumed" father rather than only an "alleged"

father. At a review of permanent plan hearing on December 5, 2007, the court vacated its finding that A---- was the presumed father of the minor and found instead that A---- was only the *alleged* father of the minor.

Appellant's name appeared for the first time on a due diligence declaration in December 2007. The record does not indicate how the Department discovered appellant's identity or why the worker believed appellant was the alleged father, but the due diligence declaration indicated appellant was serving time in state prison.[3] Subsequently, in a March 7, 2008 request for continuance, the worker reported she had located appellant in state prison and appellant had said he wanted to be present for the section 366.26 hearing.[4] The juvenile court promptly appointed an attorney for appellant, and appellant was represented by counsel at each subsequent hearing.

For a section 366.26 hearing scheduled for July 24, 2008, the court ordered a removal order to be issued for appellant. However, the removal order could not be served upon appellant because he had been moved in the meantime to a prison in Oklahoma under the COCF program.

A notice of hearing for the July 24, 2008 hearing was mailed to appellant at the Oklahoma prison on April 28, 2008. Appellant was also personally served with notice of the section 366.26 hearing on July 3, 2008. Finding the notice time inadequate, the court continued the hearing to October 23, 2008, to allow further service of notice upon appellant. Appellant was again personally served with notice on July 30, 2008. However, appellant never contacted the Department or took any steps to become a party to the proceeding. The court terminated parental rights in the minor and referred him for adoption at the section 366.26 hearing held on October 23, 2008.

Appellant timely appealed from the order.

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[3] Appellant's address was given as P.O. Box 5000, Delano, California.

[4] The worker sought a continuance of the section 366.26 hearing for further due diligence with respect to the half-sibling's alleged father.

DISCUSSION

1. Appellant Has No Standing to Appeal

The Department contends as an alleged father appellant has no standing to appeal. An alleged father who appears at the earliest possible opportunity and attempts to join the dependency proceeding has standing to appeal. (*In re Baby Boy V.* (2006) 140 Cal.App.4th 1108, 1116-1117 (*Baby Boy V.*).) An alleged father may attempt to join the proceeding by promptly requesting the juvenile court "for a finding of paternity, blood testing, reunification, or any other relief." (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 714 (*Joseph G.*).) An alleged biological father who is not a party of record in the dependency proceedings has no standing to appeal an order terminating parental rights. (*Id.* at p. 716.)

Throughout these proceedings, appellant was an alleged father. As such, he was not a party of record. (*Joseph G.*, *supra*, 83 Cal.App.4th at p. 715.) "'An alleged father in dependency or permanency proceedings does not have a known current interest because his paternity has not yet been established.'" (*Ibid*.) Thus, only persons named as parties of record or who take appropriate steps to become parties may appeal. (*Id.* at pp. 715-716.)

Appellant took no steps to have himself declared a presumed father or to join the proceedings as a party. The social worker's March 7, 2008 report indicated she had located appellant in state prison. She presumably informed appellant then of the pending proceeding because her report indicated he wished to be present for the section 366.26 hearing. Appellant thus had knowledge of the ongoing dependency proceedings in early March 2008. After his identity was discovered, appellant received two written notices of the section 366.26 hearing. Those notices informed appellant that the court could terminate parental rights in the minor and free him for adoption. The first notice was personally served on July 3, 2008, and gave notice of a section 366.26 hearing then set for July 24, 2008. The second notice was personally served on July 30, 2008, and gave notice of a continued section 366.26 hearing on October 23, 2008. Other than simply informing the worker of his desire to be present

in March 2008, appellant took no steps to become a party to the proceedings even after receiving these notices.

Although the Department's address and telephone number were on the notices personally served on appellant, he did not communicate with the Department or take any steps to change his status from an alleged father to a presumed father. Certainly, when July 24, 2008, came and went without any removal order, appellant had reason to believe no such order was forthcoming. When appellant later was served with notice of a continued hearing date for October 23, 2008, appellant could and should have made inquiry of the Department regarding the upcoming hearing.

Appellant also had appointed counsel representing him, but no section 388 petition was filed or any attempt made to change the juvenile court's prior rulings. An individual does not become a party of record "merely because his or her name and interest appear in documents filed with the court or are referenced in the judgment." (*Joseph G.*, *supra*, 83 Cal.App.4th at p. 715.) As an alleged father, appellant was entitled to notice of the proceedings, and such notice provided him with an opportunity to appear and assert a position; but the fact he may have been entitled to notice alone did not give appellant standing to appeal. (*Ibid.*; *In re Emily R.* (2000) 80 Cal.App.4th 1344, 1356-1357.)

This case differs from *Baby Boy V.*, a case in which the alleged father presented himself to the Department's office as soon as he learned the mother had been pregnant and had given birth to a child that was probably his, asked for a paternity test and stated his desire to support and care for the child. (*Baby Boy V.*, *supra*, 140 Cal.App.4th at p. 1110.) The alleged father indicated he had a stable full-time job, had provided support for another child and wished to provide for and have a relationship with Baby V. (*Id.* at p. 1116.) In short, the alleged father did everything he could to join the proceedings as a party at the earliest practicable point indicating his desire to achieve a presumed father status. (*Id.* at p. 1117.) In the present case, other than expressing a desire to be present at the section 366.26 hearing, appellant failed to take any appropriate step to become a party of record. Appellant claims that he was

entitled to appear in court to "assert his position" regarding his child, but even after learning of the dependency proceedings and receiving notices of hearings he failed to communicate with the Department or the court to assert his position or object to the proceedings going forward.

Nor is this case like *In re Paul H.* (2003) 111 Cal.App.4th 753. In *Paul H.*, the alleged father appeared at the jurisdiction hearing and indicated that he might be the minor's father. He then assiduously worked to try to establish his paternity, but the juvenile court terminated parental rights without taking the alleged father's efforts into consideration. (*Id.* at pp. 756-758.) The alleged father was found to have standing on appeal because he appeared at the hearing and asserted a position, i.e., his possible paternity, and he "took immediate steps to become a party once he was notified of the dependency proceedings. He contacted the social worker, appeared at the next court hearing, communicated to the court that he might be the minor's father and attempted to complete paternity testing." (*Id.* at p. 759.) Here, appellant did no such thing. He was made aware of the dependency proceedings as early as March 2008, when he talked to the social worker. Although appellant indicated in the conversation a desire to appear at the section 366.26 hearing to state a position, he made no effort to become a presumed father or to make himself a party. He merely sat on his hands and did nothing.

Appellant had the obligation to do more to establish his standing and could not passively wait to be summoned to court during the dependency proceedings. "While under normal circumstances a father may wait months or years before inquiring into the existence of any children that may have resulted from his sexual encounters with a woman, a child in the dependency system requires a more time-critical response. Once a child is placed in that system, the father's failure to ascertain the child's existence and develop a parental relationship with that child must necessarily occur at the risk of ultimately losing any 'opportunity to develop that biological connection into a full and enduring relationship.' [Citation.]" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 452.)

Appellant claims he had a due process right to receive the paternity form to notify him there was a paternity issue and to allow him to assert his position. However, due process simply requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Tr. Co.* (1950) 339 U.S. 306, 314; see also *In re Claudia S.* (2005) 131 Cal.App.4th 236, 247.) Appellant had notice of the proceedings and an opportunity to present his objections. Even if he was not personally present at the section 366.26 hearing, he was represented by counsel. He also could have communicated with the Department or with the court before the section 366.26 hearing. Appellant therefore had adequate notice and an opportunity to be heard regarding the paternity issue. (See *In re Emily R.*, *supra*, 80 Cal.App.4th at pp. 1354-1355.) We cannot conclude from all the circumstances that the proceedings were fundamentally unfair to appellant or that he was denied due process.

2. Claimed Error, If Any, Was Harmless

Given the complete lack of involvement or interest on appellant's part in the life of the minor, we go on to note the claimed error, if any, was not prejudicial.

Even assuming appellant had standing to appeal, the appropriate standard of review is harmless error. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 624 ["We typically apply a harmless-error analysis when a statutory mandate is disobeyed, except in a narrow category of circumstances when we deem the error reversible per se"; "we have rarely -- if ever -- found a statutory mandate to be jurisdictional when, as here, the mandate itself provides that it may be waived. [Citations.] Nothing in the text of (Penal Code section 2625) indicates the Legislature intended a different result . . . . Rather, it appears the Legislature intended merely to grant the prisoner a statutory right to attend the proceedings"].) Any failure to give appellant a paternity form or to transport appellant to the section 366.26 hearing was harmless because there was no showing appellant could prove he was a presumed father. Only a presumed, not a mere biological, father is a "parent" who is entitled to receive reunification

services, and a biological father's termination of parental rights is "almost inevitable" when the father is not involved in the dependency process prior to the section 366.26 hearing. (*In re Zacharia D., supra*, 6 Cal.4th at p. 451.) "[A] man who has neither legally married nor attempted to legally marry the mother of his child cannot become a presumed father unless he *both* 'receives the child into his home *and* openly holds out the child as his natural child.'" (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051, italics added by *Michael H.*, citing Fam. Code, § 7611, subd. (d).)

Appellant provided no evidence or even statements indicating he could satisfy these requirements, and on appeal he does not claim such a showing arguing only that he should have been provided an opportunity to do so.

DISPOSITION

The order is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J.

BENDIX, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.